BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ERIC CHILDRESS	)	
Claimant	)	
	)	
VS.	)	
	)	
PEPSI-COLA BOTTLING CO.	)	
Respondent	)	Docket Nos. 1,039,121;
	)	1,039,701
AND	)	
	)	
CONTINENTAL WESTERN INS. CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the June 18, 2008 preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

ISSUES

The ALJ found that the claimant "failed to prove by a preponderance of credible evidence that he injured his right knee in the course and scope of employment on February 1, 2008, and failed to prove that he provided timely notice of the alleged injury".[1] Thus, compensation was denied in Docket No. 1,039,701. The ALJ went on to find that the claimant did suffer some acute reinjury on the right knee on February 28, 2008, the accident that forms the basis for Docket No. 1,039,121. Accordingly, the ALJ ordered respondent to pay the claimant's medical expenses associated with his ambulance and emergency room treatment incurred immediately after the accident, but found respondent not liable for claimant's treatment of the right knee as he apparently concluded that treatment was causally related to a pre-existing condition as evidenced by an MRI report issued on February 9, 2008.

[1] ALJ Order (June 18, 2008) at 2.

The claimant requests review of whether the ALJ erred in denying treatment in both claims by finding the claimant's need for treatment was not the result of a personal injury by accident arising out of and in the course of his employment and in failing to find that proper notice was given in Docket No. 1,039,701.

Claimant contends that he reported his accident to his supervisor on February 1, 2008. Claimant also asserts that even if the February 1, 2008 accident is denied he should be allowed treatment as the February 28, 2008 accident resulted in an aggravation, intensification or acceleration of the claimant's pre-existing injury. Thus, claimant requests that the Board modify the ALJ's order and grant him further medical treatment.

Respondent argues that the ALJ's Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The ALJ's Order sets forth all of the facts in great detail and this Board Member finds that recitation to be accurate and adopts it as her own. Highly summarized, claimant asserts two separate claims, the first occurring on February 1, 2008 and the second on February 28, 2008. Both involve the right knee and both involve the act of stepping off the truck down on to the ground and a twisting of the knee.

The determinative issues are whether claimant gave notice of his first accident as required by K.S.A. 44-520 for purposes of Docket No. 1,039,701 and whether his present need for treatment is as a result of that first accident or the second, which both parties agreed occurred on February 28, 2008. If, as the ALJ found, claimant failed to give timely notice of his February 1, 2008 accident then claimant is not entitled to benefits for that accident and the resulting injuries. Alternatively, if his present need for treatment to his right knee arose out of and in the course of his employment on February 28, 2008 (rather than due to the February 1, 2008 accident) then he is entitled to the treatment he requests.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[3]

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[2] K.S.A. 2007 Supp. 44-501(a).

[3] K.S.A. 2007 Supp. 44-508(g).

In order for a claimant to collect workers compensation benefits he must suffer an accidental injury that arose out of and in the course of his employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[4]

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[5] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[6]

Finally, K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The ALJ was not persuaded by claimant's testimony about the February 1, 2008 accident. He noted:

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[4] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[5] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[6] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

> The alleged February 1, 2008 injury did not seem credible. If, as the claimant represented, he hurt his knee at work, reported a work injury, and received authorization to treat with his personal physician, one would expect the personal physician's record to reflect a work injury, not the opposite.[7]

The Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representative testify in person. And the rationale for his decision is wholly understandable. Claimant was adamant about reporting his injury and being told to proceed to his own physician, something his employer denies. That same witness specifically testified that if notice of an injury is given, employees are sent to an emergency room and are never directed to go to their own physician. The contemporaneous medical record does not reflect work as the source of his injury. It makes sense that had the accident took place as claimant says that the records should have contained some reference to his work-related accident.

Under these facts and circumstances this member of the Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify. For that reason, this Board Member concurs with the ALJ's conclusion that claimant failed to prove it was more likely true than not that he sustained an accidental injury to his right knee while in the course and scope of his employment on February 1, 2008. And this Board Member also affirms the ALJ's conclusion that claimant failed establish timely notice of his February 1, 2008 claim. That aspect of the ALJ's Order relating to Docket No. 1,039,701 is, therefore, affirmed.

At least at this juncture there is no dispute claimant sustained a second accident on February 28, 2008 while in the scope and course of his employment. However, whether claimant's present need for treatment was caused by that accident is hotly contested. On February 9, 2008 claimant had an MRI and that test revealed the following:

1. There are changes from a previous anterior cruciate repair.[8]
2. The repaired anterior cruciate ligament is torn with the repair not being present.
3. There is a moderate right knee joint effusion present.
4. There is a tear of the anterior horn of the lateral meniscus and fairly severe degenerative changes in the lateral joint compartment.
5. There are no additional abnormalities present.[9]

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[7] ALJ Order (June 18, 2008) at 2.

[8] In 2002 or 2003 claimant had an anterior cruciate repair to his right knee.

[9] P.H. Trans., Resp. Ex. 1 at 41.

The evidence shows that with a torn anterior cruciate ligament and a torn lateral meniscus, claimant returned to work and continued to work for respondent until February 28, 2008 when he again suffered an accident with an acute onset of pain in his right knee. His pain was so great he was unable to drive his truck back to the shop and required an ambulance to take him from the scene of his fall to the hospital.

Simply put, claimant maintains he aggravated his original condition in the February 28, 2008 accident. Claimant offers Dr. Prostic's opinion that he requires another MRI and ultimately arthroscopic surgery to address his meniscal tear and possibly a revision of the torn ACL. Conversely, respondent contends claimant had already damaged his knee before February 28, 2008, as evidenced by the MRI report issued on February 9, 2008.

The ALJ concluded that while claimant suffered injury on February 28, 2008 and required immediate medical attention, the surgery recommended by Dr. Prostic was intended to "address abnormalities in the knee that were present and symptomatic immediately prior to the February 28 accident."[10] And while the February 28th accident may have produced some increase in the claimant's symptoms, it did not cause the torn ACL and torn meniscus.[11] Thus, respondent was only responsible for the initial emergency medical treatment and not the diagnostic or restorative treatment outlined by Dr. Prostic.

Claimant maintains that he aggravated his condition in his accident on February 28th and as a result, his present need for treatment is compensable. Like the ALJ, this Board Member disagrees. The February 9, 2008 MRI report clearly indicates a torn ACL and a torn meniscus. There is no indication in this record that explains how claimant's need for the surgery outlined by Dr. Prostic was necessitated by the February 28th accident. The ALJ accurately noted that claimant may have had an acute increase in his symptoms following his accident, but based on this record there is no evidence that his need for surgery was accelerated or aggravated in any way. This Board Member concludes the ALJ's Order as to Docket No. 1,039,121 should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[12] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

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[10] ALJ Order (June 18, 2008) at 2.

[11] *Id.*

[12] K.S.A. 44-534a.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated June 18, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2008.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge